

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT FLORES)	
Claimant)	
)	
VS.)	
)	
BP AMOCO)	
Respondent)	Docket Nos. 267,444 & 1,000,402
)	1,013,376 & 1,017,507
)	
AND)	
)	
PACIFIC EMPLOYERS INS. CO.)	
ACE AMERICAN INSURANCE)	
Insurance Carrier)	

ORDER

Claimant requested review of the April 3, 2007 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on July 20, 2007 in Wichita, Kansas.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed that given the stipulation to consolidate these claims into a single docket number, 1,013,376, the ALJ correctly imposed a calculation rate of \$440 based upon the parties' stipulations to wage at the Regular Hearing.

ISSUES

The Administrative Law Judge (ALJ) adopted the findings of Dr. Terrence Pratt, the court-appointed independent medical examiner and awarded claimant a 9 percent permanent partial impairment to the body as a whole for injuries sustained to his back and post-concussive syndrome, while working for the respondent. Dr. Pratt concluded that claimant bore a 3 percent preexisting permanent impairment to his low back and therefore, he reduced his overall impairment rating accordingly.

The ALJ rejected claimant's assertion that he sustained a bilateral carpal tunnel injury as a result of his work-related injuries. In doing so, the ALJ noted that Dr. Pratt's opinions were substantially supported by the opinions of Dr. Melhorn and Dr. Stein and that none of these physicians concluded that claimant was suffering from bilateral carpal tunnel syndrome.

The claimant requests review of the nature and extent of his disability, arguing that the ALJ's Award should be modified to reflect his bilateral carpal tunnel complaints as evidenced by the testimony of Dr. Pedro Murati.¹ If claimant's argument is accepted and Dr. Murati's functional impairment ratings are accepted, claimant asserts that he is entitled to a separate recovery as to each scheduled member which is not separately limited by the statutory cap set forth at K.S.A. 44-510f(a)(4). In other words, the cap is to be applied separately to each scheduled injury rather than in the aggregate.

Conversely, respondent argues that the Award should be affirmed in all respects. And respondent contends that to the extent K.S.A. 44-510f(a)(4) applies, it should be applied to the total amount of claimant's functional impairment recovery and not to each scheduled member.

The only issues to be resolved in this appeal are the nature and extent of claimant's impairment as a result of his work-related accident and the application of K.S.A. 44-510f(a)(4)².

¹ Claimant concedes in light of the recent Kansas Supreme Court opinion in *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, bilateral carpal tunnel syndrome is considered two separate scheduled injuries. But a majority of the Board would combine any scheduled injury award with a general body disability to award the total of all impairments. See *Carelton v. Boeing Co.*, Docket No. 1,023,991 (WCAB July 6, 2007).

² The parties agreed that although there are four separately docketed claims, these are all to be combined into one docket, that being Docket No. 1,013,376, and that the accident date for each of the claims is considered to be October 9, 2003.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is employed by respondent as an operations technician and is required to perform various duties in the respondent's oil processing facility. During the course of his job, claimant struck his head on at least three separate occasions, the last one occurring on October 9, 2003. After his initial injury in April 2000, he complained of an immediate onset of pain in his head, neck and down in between his shoulder blades. Claimant was briefly seen by a physician and released, although he continued to complain of headaches, dizziness and nausea along with a stiff neck. According to claimant, he also experienced an onset of upper extremity pain within 30 minutes of his first accident³, this particular complaint is not reflected in any of the medical records.

Claimant's neck, headache and balance complaints continued and he was treated by various physicians. Ultimately, after an MRI, he was diagnosed with mild disk bulging from C4 to C7 and degenerative hypertrophy and facet arthrosis in the low back.

Claimant suffered a similar accident on September 11, 2001, but this event seems to have been rather minor and generated no new complaints other than those he had already been experiencing. He was given physical therapy but reports he did not improve.

Then on October 9, 2003, claimant struck his head a third time. He received physical therapy but maintains he did not improve and that his complaints continued. By this third accident, claimant was complaining of bilateral upper extremity complaints in addition to his headaches, dizziness, neck and low back complaints.

Claimant was seen at various times by a number of physicians, three of whom have testified and another who was appointed by the ALJ to perform an independent medical examination.

Dr. Pedro Murati first saw claimant on April 16, 2002 at the request of his attorney. He performed an examination and reviewed all of the medical reports generated up to that point. At the time, claimant's complaints included neck and back pain, headaches and numbness and tingling in the neck down between the shoulder blades⁴. Dr. Murati

³ R.H. Trans. at 13.

⁴ Murati Depo., Ex. 2 at 6 (Apr. 16, 2002 IME report at 1).

concluded claimant was suffering from headaches, secondary to post concussion syndrome along with myofascial pain syndrome affecting the bilateral shoulder girdles and neck and a lumbosacral strain. He assigned a 4 percent whole person permanent impairment for the myofascial pain syndrome in the neck, 4 percent for the loss of range of motion in the cervical spine, 5 percent for the lumbosacral strain and an additional 5 percent for the loss of range of motion of the lumbar spine. When combined, this yields a 17 percent permanent partial impairment.⁵

Claimant was also evaluated by Dr. Paul Stein, a neurological surgeon, on January 30, 2004. Dr. Stein not only examined claimant and reviewed the medical records, he personally reviewed the radiological reports and concluded that claimant was suffering from a cervicothoracic strain or sprain and a mild closed head injury, but no concussion.⁶ Dr. Stein assigned a 5 percent permanent impairment for claimant's DRE II cervicothoracic injury. He further testified that although claimant complained of some numbness in his hands, he did not diagnose carpal tunnel syndrome because the claimant had no nerve conduction study that would establish such a diagnosis. He also testified that claimant had not described any sort of work-related mechanism of injury that would lead him to conclude that the job caused those complaints.

Even after reviewing an October 26, 2004 EMG/NCS, Dr. Stein concluded that claimant did not have carpal tunnel and even if one believed he did, the mechanism of injury was not present. In short, while he believed that claimant sustained an upper back injury which left him with a 5 percent impairment, he did not believe the claimant's unsubstantiated carpal tunnel complaints were related to his work activities.

In October 2004, claimant was evaluated to Dr. J. Mark Melhorn for the ongoing upper extremity complaints. Dr. Melhorn diagnosed painful right and left upper extremity complaints secondary to blunt trauma and neuropraxia.⁷ But while he conceded the EMG/NCS suggested ulnar neuropathy, he did not believe claimant had either carpal tunnel or ulnar neuropathy based upon these tests results.⁸ Ultimately, Dr. Melhorn testified that he believed Dr. Stein's 5 percent impairment was appropriate.

When the parties could not agree upon an impairment rating, the ALJ ordered Dr. Terrence Pratt to conduct an independent medical examination pursuant to K.S.A. 44-

⁵ These ratings are all to the whole body.

⁶ Stein Depo. at 10.

⁷ Melhorn Depo., Ex. 2 at 5 (Oct. 11, 2004 report at 4).

⁸ *Id.* at 12.

510e(a). Following his examination, Dr. Pratt issued a report on October 11, 2005 in which he noted that claimant had a history of multiple work-related events with reported head trauma with residual complaints of vertigo, headaches, cervicothoracic syndrome, and low back pain with lumbar spondylosis.⁹ He opined that he could not directly relate the claimant's bilateral upper extremity symptoms to the claimant's report of head trauma.

Dr. Pratt's report indicates that he believed the claimant had a combined impairment of 9 percent to the whole body as a result of his work-related injuries. This rating is comprised of a 5 percent permanent partial impairment for the cervical area, 0 percent for the thoracic area, 5 percent for the lumbar area and an additional 2 percent for claimant's concussive complaints. Dr. Pratt reduced his overall impairment rating by 3 percent as he believed, based upon a post injury MRI report, that claimant had preexisting low back impairment. Thus, when the entirety of Dr. Pratt's functional impairment ratings are combined, the result is 12 percent but he reduced that figure by 3 percent to account for what he believed was a preexisting condition.

Claimant was again seen by Dr. Murati at his attorney's request. During this second visit Dr. Murati diagnosed upper back pain secondary to thoracic sprain and bilateral carpal tunnel syndrome. When asked to explain how claimant's accidents led to carpal tunnel complaints, Dr. Murati explained that claimant was suffering from "double crush" syndrome. He testified that when claimant hit his head, his C8 nerve fibers were damaged and that anywhere those nerves are found, including into his upper extremities, there will be symptoms. And, he added, that claimant's job duties were repetitive and most certainly added to his bilateral carpal tunnel complaints. Upon cross examination, Dr. Murati conceded that he did not know the details regarding claimant's work activities and whether they could be considered repetitive in nature.

Dr. Murati assigned a 10 percent each to the upper extremities, 5 percent each to the shoulders for loss of range of motion and an additional 5 percent to the whole body for the thoracic strain. When combined, these ratings yield a 21 percent whole body impairment. Dr. Murati testified that this 21 percent is independent of his earlier 17 percent rating and when the two are combined, the result is 34 percent whole body permanent partial impairment.

After considering all this evidence, the ALJ adopted Dr. Pratt's 9 percent whole body functional impairment (reflecting the deduction for preexisting impairment) and noted that several other physicians concurred with his diagnosis and conclusions. Thus, she declined to award any permanency for claimant's bilateral carpal tunnel complaints. The Board has reviewed the entire record and concludes the ALJ's Award should be modified.

⁹ Murati Depo., Ex. 3 at 15 (Dr. Pratt's Oct. 11, 2005 IME Report at 7).

There is no real dispute as to the existence of claimant's spine problems related to his accidents. Rather, the dispute here stems from the extent of those back complaints and whether claimant's bilateral carpal tunnel complaints are causally related to his work accident's. The Board, like the ALJ, is persuaded by the opinions of Dr. Pratt with respect to claimant's spine problems and his resulting permanent impairment, which are supported by those expressed by Drs. Melhorn and Stein, albeit with one caveat.

Dr. Pratt deducted 3 percent from claimant's low back impairment for what he believed was a preexisting impairment. The claimant may have had an abnormality in his back before his accident(s), but this record contains no contemporaneous medical records that predate claimant's accident(s) that would substantiate a finding of impairment. Dr. Pratt was merely relying upon a post injury MRI which revealed impairment that he believed a portion of which had to be long standing. Because there was no analysis and determination of the preexisting impairment based on the *AMA Guides*, as required by statute¹⁰, the Board finds that the record failed to prove claimant had any preexisting functional impairment. Thus, claimant's functional impairment must be modified to reflect the totality of the impairment assessed by Dr. Pratt. Thus, claimant's functional permanent partial impairment is modified to 12 percent.

The Board likewise affirms the ALJ's conclusion that claimant did not meet his evidentiary burden as to the bilateral carpal tunnel complaints. Claimant testifies that they started immediately after he struck his head the first time. However, the records do not bear that out. And even when he did begin to voice these complaints to the medical providers, necessitating an EMG/NCS, that test did not reveal any clearly positive findings. Dr. Murati seemed to believe these tests were indicative of ulnar nerve and carpal tunnel defects, although he admitted that each practitioner can decide what is a "normal" finding versus an "abnormal" one. And Dr. Murati's explanation about the "double crush" syndrome lacks enough explanation for this Board to accept that as the source of claimant's complaints, particularly when there is no support amongst the other physicians as to that causal connection and resulting diagnosis. Moreover, Dr. Murati's casual reference to repetitive work activities as a cause only further calls into question his diagnosis and causation opinion as Dr. Murati conceded he did not know what claimant's actual job duties were at any point during his employment. For these reasons, the ALJ's Award is modified to reflect the 12 percent permanent partial impairment to the whole body.

In light of the foregoing findings, claimant's argument regarding the statutory cap on functional impairment is moot.

¹⁰ See K.S.A. 44-501(c).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated April 3, 2007, is modified as follows:

The claimant is entitled to 49.80 weeks of permanent partial disability compensation at the rate of \$440.00 per week or \$21,912.00 for a 12 percent permanent partial impairment to the whole body, making a total award of \$21,912.00.

As of July 31, 2007 there would be due and owing to the claimant 49.80 weeks of permanent partial disability compensation at the rate of \$440.00 per week in the sum of \$21,912.00 for a total due and owing of \$21,912.00, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of July, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge